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No. 75-6297

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, dismissing appellants' constitutional challenge to classifications established by Congress in Sections 101(b)(1) and 101(b)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(b)(1) and 1101(b)(2), for the admission of aliens into the United States (J.S. App. A, B; 406 F. Supp. 162).

1. Congress has determined to grant special immigration preference status to aliens who are "children" or "parents" of American citizens and resident aliens, within the meaning of the Immigration and Nationality Act of 1952. Aliens who qualify

under this statutory parent-child relationship may enter the United States independent of any applicable quota or numerical limitations, 8 U.S.C. 1151(b), and may secure an immigrant visa without a labor certification, 8 U.S.C. 1182(a)(14).

The terms "child" and "parent" are defined in Sections 101(b)(1) and (2) of the Act. Included in this definition, and thus accorded a status that facilitates their being allowed to live together in this country, are a legitimate or legitimated child and his parent, a stepchild and stepparent, and an illegitimate child seeking preference by virtue of his relationship to his adopted mother or to his unwed natural mother. Illegitimate children seeking preference by virtue of their relationship to their natural fathers are not included within the statutory definition of "child." Similarly, the preference does not extend to natural fathers of illegitimate children who are citizens or resident aliens of the United States.

Appellant Ramon Fiallo is a citizen of the United States and appellants Trevor and Arthur Wilson are aliens permanently residing in this country. All are illegitimate, minor children who attempted to have their natural fathers (who are aliens) admitted to the United States under the immigration preference accorded a "parent" by Section 101(b)(2). Appellant Cleophus Warner is a naturalized United States citizen who sought to have his illegitimate, minor son admitted to this country as a permanent resident under the preference accorded a "child" by Section 101(b)(1).[1/] The Immigration and Naturalization Service denied the petitions on the ground that the son in each case was not the legitimate or legitimated offspring of the father and that the statutory definition of "parent" and "child" had therefore not been satisfied.

1/ Also named as appellants, and as plaintiffs below, are the father of appellants Fiallo and Trevor and Arthur Wilson and the son of appellant Warner. The circumstances surrounding appellants' immigration status are set forth in more detail in the opinion of the district court (J.S. App. A 2-3).

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Appellants thereupon brought this suit, alleging that Sections 101(b)(1) and (2) of the Act abridged their constitutional right to equal protection of the laws by excluding unwed natural fathers (but not unwed natural mothers) from the immigration preference. They sought to enjoin the enforcement of those provisions insofar as they operated to exclude appellants from the immigration preference granted other parents and children. A three-judge district court, convened pursuant to 28 U.S.C. 2282 (J.S. App. C), granted judgment for the government and dismissed the action. The court held, with one judge dissenting, that the classifications established by the Act were a proper exercise of Congress' extensive authority over the admission of aliens. The court concluded in addition that Congress could rationally exclude aliens whose lives did not "reflect personal standards of conduct important to our society's sense of morality" (J.S. App. A 5), that the provisions excluding aliens claiming to be unmarried, natural fathers and their illegitimate children foreclosed an avenue for numerous fraudulent claims that could pose "extremely difficult problems of investigation and proof" (id. at 8), and that the provisions in issue facilitated the fair administration of the Act as a whole.

ARGUMENT

The decision of the district court is correct and is supported by principles of immigration law that have long been accepted by this Court. There is no necessity for plenary review.

1. As this Court stated in Galvan v. Press, 347 U.S. 522, 531, the proposition that "the formulation of [policies pertaining to the entry of aliens] is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." The Court reaffirmed this in Kleindienst v. Mandel, 408 U.S. 753, 766:

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> The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." * * * "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.

Hence, while distinctions based on sex and legitimacy might be suspect if embodied in domestic legislation,[2] Congress is free to employ those and similar criteria in determining what status to accord various classes of aliens seeking to enter the United States. See Harisiades v. Shaughnessy, 342 U.S. 580, 597 (Frankfurter, J., concurring). Accordingly, aliens may be denied preferential admission, or excluded from this country altogether, on the basis of race (Dunn v. Immigration and Naturalization Service, 499 F.2d 856, 858 (C.A. 9), certiorari denied, 419 U.S. 1106) or other "immutable" characteristics such as age (Nazareno v. Attorney General, 512 F.2d 936 (C.A.D.C.), certiorari denied, 423 U.S. 832)and national origin (Noel v. Chapman, 508 F.2d 1023 (C.A. 2), certiorari denied, 423 U.S. 824) and they may be barred because of their sexual proclivities (Boutilier v. Immigration and Naturalization Service, 387 U.S. 118) or political beliefs (Kleindienst v. Mandel, supra, 408 U.S. at 762). See J.S. App. A 5.[3]

2/ But cf. Labine v. Vincent, 401 U.S. 532 (classification based on illegitimacy upheld)and Kahn v. Shevin, 416 U.S. 351 (classification based on sex upheld).

3/ See also The Japanese Immigrant Case, 189 U.S. 86; Faustino v. Immigration and Naturalization Service, 432 F.2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; Perdido v. Immigration and Naturalization Service, 420 F.2d 1179 (C.A. 5); Talanoa v. Immigration and Naturalization Service, 397 F.2d 196 (C.A. 9). Contrary to appellants' suggestion (J.S. 20-21), this Court's decisions in Almeida-Sanchez v. United States, 413 U.S. 266, and United States v. Brignoni-Ponce, 422 U.S. 873, do not represent an inroad upon this consistent recognition of the plenary power of Congress to determine the conditions under which classes of aliens may be admitted into the country. Those cases involve the procedures that the government may undertake, consistent with the Fourth Amendment, to stem the illegal entry of aliens into the United States, not the power of Congress to determine which alien

(Footnote continued on next page)

2. In view of Congress' plenary power over the admission of aliens, its enactments are not to be measured against a "compelling interest" test or other test suggested by appellants. Nonetheless, the challenged provisions of the Act are rational and further legitimate governmental interests.

At the outset, we note, as did the district court (J.S. App. A 9-10), that appellants' exclusion from the preference accorded to a "parent" and "child," as those terms are defined in the Act, was not a legislative oversight. On the contrary, it is apparent from the precise wording of Sections 101(b)(1) and (2) that Congress, in considering the problem of illegitimacy and special preferences in the admission of aliens, made a deliberate choice to include unwed mothers and their offspring and to deny the benefit to unwed fathers and their illegitimate children.

While the provisions granting exemptions to certain "parents" and "children" were, in general, designed to serve the humanitarian purpose of family unity (see Immigration and Naturalization Service v. Errico, 385 U.S. 214, 219-220) neither the language nor the history of the Act supports appellants' contention (J.S. 17) that "the exclusive purpose of Congress [was] to maintain or reunite family units, legitimate or otherwise, which include a United States citizen or permanent resident member * * *." To the contrary, large classes of persons commonly thought of as "children" are excluded from the Act's definition of the term: all children,

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(Footnote continued from preceding page)

entries are legal and which are not. Indeed, Almeida-Sanchez explicitly reaffirmed the undoubted authority of Congress to exclude aliens, 413 U.S. at 272, and Brignoni-Ponce (citing Kleindienst v. Mandel, supra) noted the "broad congressional power over immigration" but explained that "this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." 422 U.S. at 884.

regardless of age, who are married; all children who are more than twenty-one years of age; stepchildren who were older than eighteen when the marriage creating their status occurred; children who were legitimated after they were eighteen; and children adopted after the age of fourteen. Similarly, parents of these children are not "parents," within the meaning of Section 101(b)(2), for the purpose of securing special immigration preferences by virtue of their relationship to American citizens or permanent residents. Furthermore, the Act not only creates numerous categories of children and parents who are not granted privileged status, but also establishes several modified privileges relating to "parents" and "children" that depend on a number of other factors having little relation to family unity.[4/] In light of this elaborate scheme, appellants' claim that Congress inadvertently omitted them from the preferred categories of aliens is untenable.[5/]

The challenged provisions also advance legitimate substantive and procedural government interests. One rational basis for the preference exception was noted by the district court (J.S. App. A 5):

> [It] is a perfectly proper exercise of Congressional responsibility to admit into this country those individuals who will be desirable additions to our populace. This includes individuals who will respect our system of government and who will be useful additions to our labor force, as well as those whose lives reflect personal standards of conduct important to our society's sense of morality. (Footnotes omitted).

4/ For example, a resident alien "parent" will confer on his "child" either a derivative priority date, 22 C.F.R. 42.62, if the "child" is a "special immigrant" (8 U.S.C. 1101(a)(27)), or a preference, 8 U.S.C. 1153, if the child is subject to 8 U.S.C. 1151(a), though the child still must enter under the applicable numerical limitation.

5/ It is also inconsistent with appellants' contention that the challenged provisions amount to an unconstitutional "irrebuttable presumption." See p. 7, infra.

Moreover, Congress could properly have determined to limit the preference in a manner that would avoid difficult administrative problems (see Weinberger v. Salfi, 422 U.S. 779, 780) and would diminish the opportunities for fraud (J.S. App. A 8):

> [I]n view of the need to establish administrative procedures abroad which can process immigration applications efficiently, avoid extremely difficult problems of investigation and proof, and minimize the potential for sham claims, we cannot say that the legislative decision to exclude unwed, biological fathers and their illegitimate children from the statutory definitions of parent and child is patently unreasonable. Cf. Faustino v. INS, supra. For example, while the names of biological mothers routinely appear on such documents as birth certificates, this may not be the case where unmarried fathers have not acknowledged paternity officially at about the time of birth. Although such evidence would not necessarily be conclusive of one's status as a parent, nevertheless we perceive that it might be more difficult for an unrelated adult to pose as a child's mother than a child's father, where the birth certificate contains a definite name and identification of the mother only.

3. Appellants' contention (J.S. 20) that the Act embodies an unconstitutional "irrebuttable presumption"--that an illegitimate child and his father are never a "viable family unit"--also is insubstantial. As we have noted above, Congress did not intend to grant an immigration preference to every alien who was part of a "viable family unit" with an American citizen or resident alien, nor, despite appellants' claim (J.S. 19), did it "conclude" that unwed fathers never maintain close ties to their children while presuming that unwed mothers always do. Rather, Congress determined to grant immigration preferences to selected categories of aliens for a variety of reasons, some relating to the alien, some to his relatives in this country, and some for the convenience of immigration officials here and overseas.

Nor is this case analogous to Jimenez v. Weinberger, 417 U.S. 628, and similar cases upon which appellants rely (J.S. 20). The statutes in those cases purported to grant benefits to all persons

who suffered from certain conditions (e.g., pregnancy or dependency) that were determined to require relief, but excluded individuals who in fact labored under those handicaps by an irrebuttable presumption that they did not. By contrast, the preference at issue here does not presume to alleviate every adversity based on the separation of an alien's family, and depends not on the existence of any particular factual condition or characteristic (such as the closeness of a family unit) but solely on the class of applicant. As discussed earlier, Congress excluded large groups of alien children and parents, without regard to the degree of family unity that could be demonstrated, and had ample reason for excluding categories such as those occupied by appellants from the benefits of Sections 101(b)(1) and (2) of the Act.

We realize, as did the district court (J.S. App. A 5, 9), that the Act may work hardships in individual cases. However, Congress has not barred aliens such as appellants from immigrating to the United States. The fact that an individual is an illegitimate child or the father of such a child is not a basis for exclusion under the Act. Appellants, like other aliens, therefore remain free to immigrate to this country, subject to appropriate quota and other restrictions, and may be eligible for other types of relief from the Attorney General.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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